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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY WAYNE CLARKE,

Defendant and Appellant.

B204763

(Los Angeles County
Super. Ct. No. NA068664)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James B. Pierce, Judge. Affirmed as modified.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Anthony Wayne Clarke (appellant) of the first degree murder of Edgar Lanuza (Lanuza) in violation of Penal Code section 187, subdivision (a)¹ (count 1) and the attempted willful, deliberate, and premeditated murder of Theo Johnson (Johnson) in violation of sections 187 and 664 (count 2). The jury found that appellant personally and intentionally discharged a firearm that proximately caused death in count 1 and that he personally and intentionally discharged a firearm in count 2. (§ 12022.53, subds. (c), (d).) The jury found that the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Appellant admitted serving one prior prison term. (§ 667.5, subd. (b).)

The trial court sentenced appellant to a total term of 95 years to life. In count 1, the trial court imposed 25 years to life for the murder, 25 consecutive years for the firearm enhancement, and 10 years for the gang enhancement. In count 2, the trial court imposed a consecutive term of 15 years to life for the attempted murder and 20 years for the firearm enhancement.

Appellant appeals on the grounds that: (1) the trial court erred in denying his motion for disclosure of the identity of an informant; (2) he was denied due process and a fair trial when the trial judge engaged in a disparaging colloquy with the defense eyewitness expert and where the only trial issue was identity; (3) he received ineffective assistance of counsel when a potentially meritorious defense was withdrawn because trial counsel misconstrued the court's ruling and failed to present exculpatory fingerprint evidence; (4) the trial court erred in failing to declare a mistrial when police witnesses volunteered, and the prosecution elicited, prejudicial criminal history testimony that had been previously barred; and the prosecution erred in failing to properly advise the witnesses in advance of testimony, which denied appellant the due process right to a fair trial; (5) the gang allegations must be reversed because there was insufficient evidence

¹ All further references to statutes are to the Penal Code unless stated otherwise.

that the Rolling 20's is a criminal street gang within the meaning of sections 186.22 and 190.2, subdivision (a)(22), and the judgment violates the due process clause of the federal Constitution; (6) the evidence was insufficient to support the convictions, since appellant was never positively identified as the perpetrator, and evidence of his proximity to the murder weapon two days later and his cousin's possession of a car similar to the one seen at the crime scene did not provide sufficient evidence; (7) the cumulative effect of the trial errors requires reversal; and (8) the trial court erred in imposing a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) on the indeterminate life term for the murder conviction in count 1.

FACTS

Prosecution Evidence

The Shooting and Investigation

At approximately 11:00 p.m. on the night of December 12, 2005, Lanuza, Johnson, and Ricardo Guerrero (Guerrero) were standing outside Bennie's Liquor Store in Long Beach, which was near the intersection of Anaheim Street and Cherry Avenue. The three men were members of the "Graffiti Artists" or "GA" tagging crew. Lanuza and Johnson were near the pay telephone, and Guerrero was at the bus stop asking people for money. Lanuza noticed what he described as a white Jeep passing by in the alley and mentioned it to Johnson. Johnson did not see the Jeep, but in a moment he saw a thin, dark-skinned Black man quickly emerge from the alley. The man was about five feet seven inches or five feet eight inches in height.

The man said, "Where you from?" Johnson and Guerrero interpreted this as a question regarding their gang affiliation. The man seemed angry, and Johnson feared something was about to happen. Before Johnson could answer, the man pulled a gun from his waist and shot at Johnson's head. The bullet missed, and Johnson ducked and ran through the alley, hearing additional shots as he ran. He assumed his companions had

also run away. The man fired at Guerrero and missed.² Guerrero ran away in the opposite direction from Johnson and heard three or four shots as he ran. The alley was very dark despite several lights in the area.

As Johnson ran through the alley, he saw the white Jeep parked there. He looked backwards and saw the same man still shooting at him. He told police there was a man seated in the passenger seat of the Jeep, but he did not remember this fact at trial. Johnson ran to a friend's house nearby and Guerrero arrived there shortly thereafter. Lanuza never arrived. Johnson and Guerrero saw the same white Jeep pass by their friend's house, and they ducked behind a bush. The Jeep had lights where the running board should be. At trial, People's exhibit No. 14 depicted the car connected to appellant, and this car had no running board and no lights where the running board would be.

Long Beach police officers arrived at the scene and found Lanuza lying next to the pay phone. The officers recovered four expended shell casings and an expended bullet.

Johnson testified that he and Guerrero returned to the shooting scene and saw the police activity. They found out that Lanuza was in the hospital, and the next day they learned he had died. Johnson and Guerrero did not speak to the police at the scene. Guerrero denied returning to the shooting scene.

Lanuza died from a gunshot wound to the head that was delivered at a range of approximately two feet. He also suffered a gunshot wound to the chest. No bullets were found in the body.

Detectives Daniel Mendoza (Mendoza) and Robert Gonzales (Gonzales) interviewed Johnson four days after the shooting. Johnson was reluctant to describe what had occurred. He explained that he was a Black male in a predominantly Hispanic

² Guerrero testified at trial that he believed he was shot at because he heard shots while running away, although he had told police the man pointed at him and fired. The jury acquitted appellant of the attempted murder of Guerrero in count 3.

tagging crew and he feared for his safety. He believed cooperating with the police would label him as a snitch and might lead to his being hurt.

Johnson circled appellant's photograph in the six-pack the detectives showed him. Johnson wrote that "He looks more older and darker than number three, but he looks like him." Before making his identification, Johnson picked up the photographs and put them down again and studied them for two minutes.

At trial, Johnson said the police told him to pick the person who looked the most like the shooter, and that was all he did. He was not indicating that the person he picked was the shooter. The shooter was unusually dark-skinned, and appellant's color was not consistent with the shooter's color. Johnson denied that he later told detectives he had thought it over and decided he was sure the person he had selected "really looks like the person who shot me. The only difference is that he looked darker in person." Detective Mendoza testified that he showed Johnson a photograph of the white Blazer belonging to Kimico Clarke (Kimico), appellant's cousin, on December 21, 2005. Johnson said it looked like the car he saw on the night of the shooting. Johnson wrote, "Hell, yeah. It looks like the car." Johnson said at that time that he was sure the person he had selected was the one who shot him.

In May 2005, Johnson was taken into custody and held for 11 days for refusing to testify at a prior proceeding. Johnson told the prosecutor and Gonzales at that time that he did not want to be labeled a snitch. He was afraid he would be injured while in custody. He feared that his records would show he cooperated and testified in a court proceeding. Johnson eventually testified in a prior proceeding on May 24, 2007. He stated that he saw the shooter in court and that he was previously afraid to testify because he feared retaliation and did not want to be known as a snitch.

Johnson was in state prison at the time of trial. He did not identify appellant at trial as the shooter. The prosecutor impeached Johnson with his prior identification of appellant at an earlier proceeding and with his prior admission of being afraid to testify.

Guerrero was unable to identify anyone in the six-pack. Guerrero did not identify appellant at trial.

James Vannoy (Vannoy) was working in the liquor store on the night of the shooting, and he heard several gunshots. When he looked outside he saw a white, older Blazer drive past the store. It was going toward the alley. Vannoy ran to the back of the store, where he heard several more gunshots. Vannoy looked through the back door window and saw the Blazer drive through the alley. Vannoy believed there was a passenger in the Blazer. Vannoy went outside and saw that Lanuza had been shot. Vannoy remembered seeing the same Blazer earlier in the evening. It was traveling westbound on Anaheim Street and was driven by an attractive woman. Vannoy was familiar with Blazers because he owned a 1984 Blazer at the time of the shooting. Vannoy stated at trial that the car depicted in People's exhibit No. 14, which was Kimico's Blazer, was the same type and color as the Blazer he saw on the night of the shooting.

On December 14, 2005, between 11:00 a.m. and noon, several Long Beach detectives followed a blue GMC Yukon as it traveled through Long Beach streets and made several stops. When the detectives saw the Yukon make an unsafe lane change, they stopped the car. Detectives Bobby Anguiano and Tim Olson (Olson) found four occupants in the car. Appellant was in the rear left seat, Christopher Brown was in the rear right seat, Charles Rhea (Rhea) was the front passenger, and Luther Richards was the driver. The detectives approached the Yukon and saw that appellant's torso was turned to the right and his right arm was behind the backrest. His right arm was moving up and down, and it appeared he was trying to hide something behind the seat.

Detective David Urbina arrived at the traffic stop and searched the center of the Yukon's rear bench seat. He found a loaded Colt .380-caliber handgun and a Braco nine-millimeter handgun behind the bench seat, directly below the backrest. They were hidden between the two cushions and behind a cloth latch.

Olson knew appellant from prior contacts, which occurred on September 16 and October 2 of 2002, and on December 14, 2005. Appellant told Olson he was a member of the Rolling 20's gang and that his moniker was "La La." Olson documented these contacts on field interview (FI) cards.

Troy Ward, a criminalist, compared the .380-handgun recovered from the Yukon with the four fired cartridge casings and the fired bullet found at the shooting scene at Bennie's Liquor Store. Ward determined that the four cartridge casings and the bullet were all fired from that gun.

In December 2005 appellant frequently stayed at the home of his cousin, Kimico. She lived about two streets away from the intersection of Anaheim Street and Cherry Avenue. She remembered that appellant borrowed her white, 1991 Blazer on a weekday evening during the month of December 2005. On December 20, 2005, police took the Blazer from Kimico's home.

Gang Evidence

Detective Hector Gutierrez (Gutierrez) testified as an expert on the Rolling 20's Crips gang. He discussed their membership and territory and noted that they did not get along with any other gangs, especially Hispanic gangs. He testified about the convictions suffered by two members of the Rolling 20's in September 2005 and June 2006.

Gutierrez was of the opinion that appellant was a member of Rolling 20's with the moniker La La. He based his opinion on appellant's admission of gang membership and his tattoos, associates, and arrest record. Gutierrez described in detail appellant's gang-related tattoos. He stated that the three other occupants of the blue Yukon were Rolling 20's members. The prosecutor read Gutierrez a hypothetical consistent with the facts of this case, and Gutierrez stated that he believed the crimes were committed for the benefit of the Rolling 20's Crips gang.

Defense Evidence

Patricia Jones (Jones) testified that she picked up appellant at 9:00 a.m. on December 14, 2005, the day detectives made a traffic stop of the Yukon between 11:00

a.m. and noon. Jones and appellant took Jones's children to a community hospital to get shots. Jones dropped off appellant at his aunt's home at approximately 11:05 a.m.

Dr. Robert Shomer (Shomer), a psychologist, testified as an expert on the subject of eyewitness identification and perception. He stated that eyewitness identifications are less accurate in stressful situations, and the passage of time adversely affects identification ability. When a weapon is present, people are even less accurate because they look at the weapon and not at the person's face. With respect to photographic lineups, Shomer said that showing a witness only one photograph at a time leads to more accurate results. Identification of strangers and cross-racial identifications are less accurate. A statement that someone looks the most like a person is not a positive identification.

The defense called Gonzales, who stated he ordered fingerprint testing for the recovered .380-caliber handgun. He did not order gunshot residue testing of appellant or of his clothing.

DISCUSSION

I. Denial of Motion for Disclosure

A. Proceedings Below

On October 5, 2006, Judge James B. Pierce heard appellant's motion to disclose the identity of a confidential informant.³ Defense counsel first examined Detective James Kloss (Kloss). Kloss stated he received information from a paid confidential informant whom he had used before about a gun that might be located at 1322 Esther Street in the City of Long Beach. He received the information on the day the Yukon was stopped. Kloss invoked the privilege not to answer the question as to how the informant obtained the information. The informant did not say he or she had seen anyone in possession of the weapon before December 14, 2005, the day of the stop. Kloss refused to say whether the informant had personally seen the weapon. He said that the informant

³ The record does not contain a copy of the written motion.

specified that the weapon was used in what was known as the Tobos murder at 14th Street and Long Beach Boulevard—a different murder from the instant case. Kloss stated that all the information he received was related to the Tobos murder and one weapon, a nine-millimeter gun. Kloss knew such a gun was used in the Tobos murder. There was no information regarding any other gun or a murder that occurred on Cherry Avenue and Anaheim Street. Kloss refused to say whether the informant had been interviewed by detectives. On prior occasions, the informant’s tips had always been accurate.

The parties stipulated that the weapon used in the instant murder was a .380. Defense counsel argued that he needed to know the identity of the informant in order to find out whether the informant saw anyone else in possession of the Lanuza murder weapon sometime between December 12, 2005, when the murder occurred, and December 14, 2005, when appellant was stopped in the traffic stop of the Yukon.

After hearing argument, the trial court requested on its own motion an in camera hearing in order to ask Kloss the questions he had refused to answer based on his belief the answers would likely lead to the informant’s identification. The court would then determine if the informant was material. The court stated it was not requesting the informant’s presence or the disclosure of his identity.

The trial court ultimately denied the disclosure motion.

B. Appellant’s Argument

Appellant requests this court to review the transcript of the in camera hearing to determine if grounds exist for disclosure based upon witness materiality. Appellant asks this court to make six specific determinations.⁴ According to appellant, if the only

⁴ These determinations are: “1. Whether the evidence at the in camera hearing was given under oath or affirmation, as required by *People v. Gooch* [1983] 139 Cal.App.3d [342,] 345-346 and *People v. Lee* [1985] 164 Cal.App.3d [830,] 834. [¶] 2. Whether the evidence introduced at the hearing was in the form of an officer’s bald opinion, within the meaning of *People v. Coleman* [1977] 72 Cal.App.3d [287,] 298. [¶] 3. Whether the conclusion that disclosure was not required was based on the assumption the informant, if

testimony was that of Kloss, that officer's opinion or hearsay declaration about what the informant saw or might say is not proper evidence upon which to base a ruling.

Appellant points out that the informant gave information regarding the weapon on the same day as appellant's arrest. He or she may therefore have had percipient knowledge that a person other than appellant possessed the murder weapon at the residence and carried it to the car prior to, or independent of, appellant's entry into the car. This information might result in appellant's exoneration, since he was tied to the murder by his proximity to the murder weapon in the car.

C. Relevant Authority

Evidence Code section 1041 allows a public entity to claim the privilege of refusing to disclose the identity of an informant if disclosure is against the public interest.⁵ Evidence Code section 1042 subdivision (d) provides that when a party

called to testify, would confirm the officer's testimony. (*Ibid.*) [¶] Whether the trial court relied on an officer's characterization of the informant's statement to the officer or on the conclusions the officer drew from that statement, rather than hearing the informant's verbatim account. (*People v. Lee, supra*, 164 Cal.App.3d at p. 840; see also *In re Tracy J.* [1979] 94 Cal.App.3d 472,] 477-478. [¶] 5. Whether the evidence offered at the hearing was inadmissible on the ground of hearsay or for any other reason. (See *People v. Lee, supra*, 164 Cal.App.3d at pp. 840-841.) [¶] 6. Whether the evidence at the in camera hearing shows there was a reasonable possibility the informant could give evidence on the issue of guilt, which might result in appellant's exoneration or conviction of a lesser offense than charged. (See *People v. Lanfrey* [1988] 204 Cal.App.3d [491,] 503."

⁵ Evidence Code section 1041 provides: "(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or [¶] (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the

demands disclosure the court must conduct a hearing. If a person authorized to claim the privilege refuses to answer any question on the ground that the answer would tend to disclose the informant's identity, the prosecuting attorney may request an in camera hearing.⁶ The court must not order disclosure unless it concludes there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered. [¶] (b) This section applies only if the information is furnished in confidence by the informer to: [¶] (1) A law enforcement officer; [¶] (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or [¶] (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2). [¶] (c) There is no privilege under this section to prevent the informer from disclosing his identity.”

⁶ Evidence Code section 1042 provides: “(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material. [¶] (b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it. [¶] (c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure. [¶] (d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the

“[T]he prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant. [Citation.] An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of adducing ““some evidence”” on this score. [Citation.]” (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) Conversely, when the evidence adduced at an in camera hearing tends to establish the lack of a “reasonable possibility that a particular percipient eyewitness-informer could give evidence on the issue of guilt which might result in a defendant’s exoneration . . . , the witness would not be material under the test for materiality established by the California Supreme Court.” (*People v. Lanfrey* (1988) 204 Cal.App.3d 491, 502-503; see *People v. Lawley*, *supra*, at p. 159.)

Mere speculation as to materiality is not sufficient to warrant disclosure. (*People v. Luera* (2001) 86 Cal.App.4th 513, 526.) A “defendant’s showing to obtain disclosure of an informant’s identity must rise above the level of *sheer* or *unreasonable* speculation, and reach at least the low plateau of reasonable possibility.” (*People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044.)

answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.”

In *Roviaro v. United States* (1957) 353 U.S. 53 (*Rovario*), the United States Supreme Court recognized the prosecution's privilege to refuse to disclose the identity of a confidential informant, but imposed various limitations on that privilege to ensure that its application comported with "the fundamental requirements of fairness." (*Id.* at p. 60.) "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." (*Id.* at pp. 60-61, fn. omitted.) The nature of that determination precluded the establishment of a "fixed rule with respect to disclosure." (*Id.* at p. 62.) Instead, the *Roviaro* court favored an approach that balanced the "public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." (*Ibid.*)

The question of whether a trial court's denial of a motion to disclose the identity of a confidential informant is subject to de novo review or is reviewed for abuse of discretion is unsettled. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1245-1246, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Accordingly, we will review the trial court's ruling de novo.

D. Motion Properly Denied

We have reviewed the reporter's transcript of the in camera hearing that occurred outside the presence of appellant and his counsel, taking into account specific questions raised by appellant on appeal. All evidence introduced at the hearing was given under oath, and no opinions, characterizations of witness statements, or assumptions or conclusions were uttered by any testifying officer—merely facts. We observe that, "[n]either expressly nor by implication does Evidence Code section 1042, subdivision (d) require the confidential informant to be present or to testify at the in camera hearing. Instead, that section provides that 'the prosecution *may* offer *evidence* which would tend

to disclose or which discloses the identity of the informant’ (Evid. Code, § 1042, subd. (d); italics added.) It says nothing about the type of evidence to be offered on these issues.” (*People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079.)

We are satisfied from the information imparted during the in camera hearing that no confidential informant was a material witness who could provide evidence that might result in appellant’s exoneration. The trial court conducted “a sufficiently searching inquiry,” and properly concluded “that the informant could not have provided any evidence that, to a reasonable possibility, might have exonerated defendant.” (*People v. Lawley, supra*, 27 Cal.4th at p. 160.) Disclosure of the informant’s identity was not a prerequisite to a fair trial in this case, and the trial court did not err in denying the disclosure motion.

II. Alleged Judicial Misconduct

A. Appellant’s Argument

Appellant contends the trial court disparaged appellant’s eyewitness identification expert, Shomer, by aggressively questioning him in a hostile tone. The trial court also interrupted cross-examination to quiz the expert on his billing arrangements and implied the expert was prolonging his testimony to increase his payment. The trial court wrongly conveyed to the jury that the court was on the prosecution’s side and the expert should not be believed. The trial court’s misconduct impaired appellant’s right to present a defense, rendered the trial fundamentally unfair, and deprived appellant of his federal right to due process and his Sixth Amendment right to a jury trial, since identity was the only issue in this case, and the victim identification was weak.

B. Proceedings Below

Toward the beginning of Shomer’s direct examination, defense counsel brought out the fact that Shomer was a paid witness. Early in Shomer’s testimony, when asked whether or not he was a licensed psychologist, Shomer began to expand upon his background. The trial court stated, “Dr. Shomer, I think we’re going to get through this a lot quicker if you just listen to the question and answer only the question.” Shomer

agreed. Thereafter, Shomer testified, giving very lengthy answers, with very little interruption. The prosecutor objected to an answer on the ground of its being nonresponsive, and the trial court sustained the objection, stating. “Listen very carefully to the question. Answer only the question.” The trial court overruled another objection on the same ground and allowed Shomer to finish his answer.

During cross-examination, the prosecutor asked the court to strike part of one of Shomer’s answers because it was nonresponsive. The trial court addressed Shomer, stating, “Please, sir. If you just listen to the question, that’s the only question. We’ll get through this a lot quicker. Believe me.”

Shomer continued to attempt to expand upon his answers. The prosecutor reminded him that “a lot of these questions are going to be ‘yes’ or ‘no’ answers.” At one point, the prosecutor asked Shomer to state the last time he had observed eyewitnesses testify, and Shomer said it was about 15 years earlier and began to say “The judge allowed me to watch” When the prosecutor cut Shomer off, defense counsel asked if Shomer might be allowed to finish his answer. The following exchange occurred: “THE COURT: No. He may not. Dr. Shomer, I’m going to ask you for I think the third or fourth time listen very carefully to the question and answer only the question. We’re not asking you the circumstances surrounding the time that you did it. She asked you when it was. That’s a simple question. And you said I think approximately 15 years ago? THE WITNESS: All right. THE COURT: Is that your answer? THE WITNESS: Yes. It is. THE COURT: No one’s asking you about the circumstances surrounding that. THE WITNESS: Thank you. THE COURT: And why you came in 15 years ago. THE WITNESS: Thank you, your Honor. THE COURT: So we’ll save a lot of time. You’re billing by the way by time; are you not? THE WITNESS: No. I’m not, your Honor. THE COURT: Oh, you’re not? THE WITNESS: No. I’m not. THE COURT: How do you get paid? THE WITNESS: There’s a cap rate on this particular case if I were here for next two days. THE COURT: I see. So you’re telling me — THE WITNESS: And that cap rate is \$1,000 for these services, your

Honor. THE COURT: I see. So you're at the cap rate. And so what's contained here on the approved expert witness list of testimony at \$150 an hour is not correct? THE WITNESS: Oh, it is correct. But that's not the way I'm billing this particular case. THE COURT: I asked you are you billing by the time, by the hour. THE WITNESS: I do not, your Honor, regardless of what the pace amount says. Because prior to that, I indicated to the attorney that I'm either appointed or not at a certain cap rate regardless — THE COURT: Do you see anywhere here it says anything about a cap rate? THE WITNESS: No. It does not, your Honor. THE COURT: So you're not following the procedures of the L.A. Superior Court? THE WITNESS: That is not a stated procedure that you have to bill by the hour. THE COURT: Let me ask you this, Dr. Shomer. Would you read what it says under 'rate'? THE WITNESS: Certainly. It says, 'Rate, \$150 per hour of testimony.' And it gives my name and address and e-mail. THE COURT: And that's all it says. THE WITNESS: That's correct. THE COURT: Thank you. Next question.”

When Shomer's testimony concluded, defense counsel objected to the court's questioning of Shomer, stating that the tone and questions were argumentative and insinuated malfeasance with respect to Shomer's billing practices. He argued that the trial court had challenged Shomer's veracity and integrity and appeared to take sides. Counsel stated that the jurors' faces indicated “surprise and shock.” Counsel requested a mistrial.

The court replied, “Well, that is denied, Mr. Hamilton.” The court responded that it was not taking sides with its billing questions. The trial court took exception to Shomer's claim he was not on an hourly basis. The trial court stated that the colloquy began with the trial court's repeatedly asking Shomer to just answer the question. When the discussion turned to the hourly basis of Shomer's fees, Shomer claimed he was not on an hourly rate, but the trial court knew it had signed for fees on an hourly basis. Shomer implied his fee was \$1,000 regardless of how long he was in court, and the trial court was merely trying to clarify that it was not, but Shomer kept challenging the point.

Defense counsel understood that the court may have interpreted Shomer's statements that way, but what counsel found inappropriate was the fact that the inquiry was conducted in the presence of the jury. The trial court said that it was trying to get Shomer to give short answers to the prosecutor's questions for the third or fourth time, and had incidentally asked Shomer, "You are here on the clock?" Shomer replied that he was not.

Appellant's second counsel, Ms. Vitale, pointed out that the prosecution witnesses are also "on the clock" and "it seemed extremely prejudicial for the court to advance the line of inquiry that it did before this jury." She stated that the trial court's inquiry thoroughly discredited Shomer's testimony before the jury.

Mr. Hamilton stated it was obvious to the jury that the court was upset and disputing Shomer's word, which affected his credibility. The exchange was heated and the court raised its voice. Both counsel reiterated that the jury looked shocked by the exchange, and it seemed the court was taking sides. Ms. Vitale said, "I think it was the tone, your Honor," and she characterized it as "almost hostile."

The trial court replied, "I agree. But it was only after the third or fourth time. I couldn't shut him up." Mr. Hamilton stated that it would have been more appropriate to have the jury go into the jury room, since Shomer's billing practices had little to do to the subject of his testimony. The trial court responded that it was concerned about a witness going far afield on a single question after being asked for the third or fourth time not to do so. The court believed Shomer was lengthening his answers to prolong his stay on the witness stand. The trial court stated it would have done the same thing had the witness been a police officer. Upon being asked if they wished to put anything else on the record, the defense turned to another matter.

C. Relevant Authority

"The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered.' [Citation.] To this end, 'the court has a duty to see that justice is done and to bring out facts relevant

to the jury's determination.' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237 (*Sturm*)). Trial courts have a general duty to control trial proceedings and maintain order and decorum in the courtroom as well as to limit the introduction of evidence to relevant and material matters. (§ 1044; see *Sturm, supra*, at p. 1237.) The trial court has broad discretionary power to control the proceedings in the courtroom; however, in exercising its discretion, the trial court must be impartial and must assure that the defendant is afforded a fair trial. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

"Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]" (*Sturm, supra*, 37 Cal.4th at p. 1237.) "'Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials.' [Citation.]" (*People v. Campbell* (1958) 162 Cal.App.2d 776, 787.)

The propriety and prejudicial effect of a particular judicial comment is evaluated "'on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.) "'The misconduct of a trial judge which will warrant a reversal of the judgment should be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial.'" (*People v. Walker* (1957) 150 Cal.App.2d 594, 605.)

D. No Judicial Misconduct

We conclude the trial court's questioning of Shomer did not rise to the level of judicial misconduct and did not deprive appellant of a defense. The trial court clearly had a desire to expedite the expert testimony. It asked Shomer several times to answer only the question and not to expand upon his answers with unnecessary details. Shomer testified for a lengthy period of time—26 pages in the record—without any interruption by the trial court and with few objections from the prosecutor. Although the trial court sustained one prosecution "nonresponsive" objection, it overruled two and allowed Shomer to continue. Appellant was not deprived of a defense, since defense counsel was

completely able to lay out his case for the weaknesses in Johnson's identification of appellant as the shooter.

The exchange between the trial court and Shomer was not related to Shomer's veracity as an expert or the credibility of the research about which he testified. The trial court never questioned his knowledge or expertise—only his verbosity. Unlike the trial court in *Sturm*, the court here gave no indication it did not take seriously the defense theory. (*Sturm, supra*, 37 Cal.4th at p. 1238.) Far more egregious behavior has been held not to constitute judicial misconduct. In *People v. Campbell, supra*, 162 Cal.App.2d 776, 786-788, the court concluded that, although the record revealed more than 15 instances where the trial court took over the examination of a prosecution witness when it was entirely unnecessary for the trial court to intervene, and when the only testimony the court elicited was adverse to the defendant, reversal was not required and no miscarriage of justice resulted. Even if it were improper, the trial court's questioning of Shomer's billing for the case "fall[s] short of the intemperate or biased judicial conduct which warrants reversal." (*People v. Melton* (1988) 44 Cal.3d 713, 754.)

In any event, we believe appellant suffered no prejudice as a result of the exchange between the trial court and Shomer. First, just prior to deliberations, the trial court read CALCRIM No. 3550 to the jury, which states, inter alia, "It is not my role to tell you what your verdicts should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." This instruction helped to dispel any possible prejudice from the purported judicial misconduct. (See *People v. Harbolt* (1988) 206 Cal.App.3d 140, 158.) Moreover, Shomer responded to the trial court, explaining that billing by the hour was not a stated procedure of the superior court, and the trial court did not argue with Shomer. Finally, although Shomer's testimony related to the identification made by Johnson, there was other evidence implicating appellant in the shooting.

In the context of the entire trial, the trial court's inquiry of Shomer was unlikely to cause any bias against the defense. We conclude there was no judicial misconduct, and the trial court's discussion with Shomer caused appellant no prejudice.

III. Alleged Ineffective Assistance of Counsel

A. Appellant's Argument

Appellant contends his counsel failed to understand the court's ruling on fingerprint evidence and failed to present testimony on this issue. Appellant suffered prejudice because the jury did not hear this exculpatory evidence. He asserts it is reasonably probable that a more favorable outcome would have occurred absent counsel's substandard performance.

B. Proceedings Below

During a recess in the prosecution's case-in-chief, the prosecutor asked the court to limit the proposed defense fingerprint expert to testimony about the .380 handgun and not the nine-millimeter handgun that was also found in the Yukon. Defense counsel told the court that the expert's report indicated that no prints were found on the .380 gun, but a fingerprint found on the nine-millimeter matched Rhea, the front passenger. The expert compared fingerprints of all of the Yukon's occupants, and, except for Rhea, none of their prints were found on either weapon.

The prosecutor objected to admission of the report on hearsay grounds and argued that any prints found on the nine-millimeter were not relevant to this case. The trial court stated that the issue of how fingerprints in general are found and matched, or not matched, had to be explored with the expert. The following exchange ensued: "THE COURT: . . . I have no problem. But I agree with your objection that the report itself doesn't come in, and that's not—it doesn't go on the screen. But you can elicit that testimony from the fingerprint expert." MR. HAMILTON [Defense Counsel]: "That she tested both guns?" "THE COURT: Yes." "MR. HAMILTON: And what she—"

“THE COURT: And everything else, that she got multiple prints. But one matched up to one person in the car.” “MR. HAMILTON: Right. Now, also, should I have her here at 1:30?”

The prosecutor interjected that there was a foundation issue since the proposed witness did not test the gun or process the prints. The court indicated to defense counsel that he needed to call the person who lifted the print that his proposed witness compared. The prosecution’s case-in-chief resumed.

The defense did not call the proposed fingerprint expert to the stand. At the hearing on the defense motion for a new trial, counsel stated, “The other issue involved the court’s ruling that would not allow me to bring in any evidence regarding any prints being found on the nine-millimeter weapon, which was a weapon that was found in the same location in the vehicle as the .380. And the print belonged to Mr. Charles Rhea, who was one of the occupants of that vehicle. . . . And the jury could easily have believed—and which I think would have been appropriate under the circumstances—that either he or one of the other persons in the vehicle was the person who had—who had possession of those weapons, who placed those weapons in the location they were recovered.” The prosecutor pointed out that the court ruled that the defense would be allowed to present fingerprint evidence on both guns on the condition that the person who removed the prints from the gun would lay the proper foundation.

Defense counsel responded that the trial court clearly indicated to him that it would not permit any evidence of prints to be introduced regarding the nine-millimeter. Counsel said he had labored under this impression during the entire trial. He decided not to call the expert, who would say that no prints were found on the .380, since a general discussion of why prints might not be found on a gun in every instance would not help the defense. The court denied the new trial motion in its entirety.

C. Relevant Authority

In order to sustain on appeal a claim of ineffective assistance of counsel, a defendant must show counsel’s performance was deficient and it is reasonably probable

defendant would have achieved a more favorable result in the absence of the asserted error. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) Trial counsel's performance may be deemed deficient only if "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Furthermore, a defendant must affirmatively show that it is reasonably probable a determination more favorable to him would have resulted in the absence of counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*); *People v. Ledesma, supra*, at pp. 217-218.) A reasonable probability is one sufficient to undermine confidence in the outcome. (*Strickland, supra*, at p. 694.) An appellate court need not address both prongs of the test before rejecting a claim of ineffective assistance of counsel. (*Id.* at p. 697.)

D. Counsel Not Ineffective

We disagree with appellant's characterization of the evidence as "key exculpatory defense evidence," and find appellant suffered no prejudice as a result of defense counsel's failure to present the expert testimony. As appellant points out, no evidence was introduced by the prosecution or the defense regarding the prints, or lack of prints, found on either the nine-millimeter gun or the .380. The expert was to be allowed to testify that Rhea's print was found on the nine-millimeter. It is a leap to consider this fact as exculpatory evidence that appellant had nothing to do with the .380 gun, the Lanuza murder weapon, and that appellant would have received a more favorable outcome had the jury learned about Rhea's print on a gun that was not the murder weapon.

As trial counsel pointed out, the fingerprint expert surely would have been asked questions regarding the possible reasons why no fingerprints belonging to appellant or another occupant of the blue Yukon were found on the .380 gun. The witness would likely have explained away any favorable implications that the absence of prints might entail. There still would have been no evidence linking Rhea to the instant murder—only evidence that he handled at some time a gun that had no connection to this murder. Moreover, although appellant argues that his strongest link to the crime was his proximity

to the murder weapon, this is not the entire picture. Appellant was seen by the officers to be stuffing something into the space where the murder weapon was found. In addition, there was Johnson's identification, even though he initially wavered, and there was the evidence of appellant's cousin's white Blazer looking like the car carrying the shooter. There was testimony by appellant's cousin that she lent him her Blazer that month only twice. Once was on a weekday evening, and the murder occurred on a weekday.

Having determined appellant suffered no prejudice from the lack of testimony that Rhea's print was found on a weapon unconnected to this case, we conclude there was no ineffective assistance of counsel.

IV. Denial of Mistrial Motion

A. Appellant's Argument

Appellant contends that the prosecutor was in error when it failed to admonish and control its witness, Detective Gutierrez. The witness mentioned appellant's arrest record in violation of the court's ruling excluding evidence of appellant's criminal history. The trial court then erred in refusing to declare a mistrial for this prejudicial violation of its exclusion order. Appellant was thus denied due process and a fair trial.

B. Proceedings Below

In a previous proceeding, the trial court granted a mistrial in appellant's case because the prosecutor played a tape and distributed a transcript that had not been properly redacted. They failed to exclude all mention of the fact that appellant had been arrested in the Blazer before the instant murder and attempted murder were committed. Before the current trial began, the prosecutor filed a motion under Evidence Code section 1101, subdivision (b) to admit evidence of a 1993 incident in which appellant shot a man after he and two other men asked the victim where he was from. The trial court denied the motion and excluded evidence of the incident in order to avoid prejudicing the jury. The court told the prosecutor that her gang witness should be cautioned not to volunteer evidence of the 1993 incident. If the prosecutor later believed that the door had been opened for the evidence of this arrest to come in on the gang issue, she was to request a

sidebar first. When the prosecutor asked if the evidence could come in without going into the facts, merely as proof of just another contact that showed appellant was in a gang, the trial court said, “No. I don’t want him going into the facts.”

The court went on to say that “if he’s had prior contacts where he was self-admitted or they made some determination that he was a member of a gang, it may be relevant even if it goes back to 1993.” The trial court did not know what the gang expert would say, but it did not want “these specific facts coming out.” It also cautioned defense counsel, “You have to be careful in how you ask him about the 1993 incident.”

The prosecutor called Gutierrez as a gang expert. Gutierrez identified appellant in court as someone who was known to him. The prosecutor asked the detective if he had an opinion as to whether or not appellant was a member of the Rolling 20’s gang, and the detective replied that appellant was a member. When asked the basis of his opinion, Gutierrez answered, “Self-admissions, tattoos, associations, and his arrest record.” Counsel objected and said in a sidebar that “the officer just testified or made reference to previous arrests of Mr. Clarke.” Counsel asked for a mistrial, since the jury now knew his client had been previously arrested.

The prosecutor responded that the detective referred only to appellant’s arrest record and did not specify which arrest. The jury already knew that appellant was arrested on December 14, 2005, and there was therefore no prejudice. The trial court stated, “I agree. I’m going to deny your motion for mistrial.”

C. Relevant Authority

In denying a motion for mistrial a trial court does not abuse its discretion if it is satisfied that no injustice has resulted or will result from the occurrences being challenged by such a motion. (*People v. Dominguez* (1981) 121 Cal.App.3d 481, 508.) A motion for a mistrial presupposes that the effect of the objectionable evidence is so prejudicial that it is not cured by striking it and admonishing the jury to disregard it. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) The appellate court must therefore examine the record to determine if the trial judge abused his discretion in

denying defendant's motion. (*Ibid.*) "Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581.)

D. Motion Properly Denied

As our account of the pretrial hearing shows, the trial court specifically prohibited admission of any of the factual details of appellant's 1993 arrest. The trial court told the prosecutor to caution its witness about revealing these details. The record shows that none of these details were put before the jury. Gutierrez's fleeting mention of appellant's arrest record could not have prejudiced appellant in the eyes of the jury, since appellant was arrested with other gang members in the instant case. No mention was made of any specific arrest. For example, in *People v. Bolden* (2002) 29 Cal.4th 515, a police officer volunteered he had located the defendant through the Department of Corrections parole office, although he had been admonished not to mention the parole office after he had provided the same testimony at the preliminary hearing. (*Id.* at p. 553.) The Supreme Court found the trial court had not abused its discretion in denying the defendant's motion for mistrial. The court noted the incident was insignificant in the context of the entire guilt trial. The court also found it "doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction." (*Id.* at p. 555.)

Any claim of prosecutorial misconduct was forfeited, since appellant did not object on that ground and did not request a curative admonition. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Furthermore, there is no evidence that the prosecutor deliberately sought this momentary and insignificant reference to an arrest record in violation of the court's order. As noted, the court's order and the argument preceding it focused on exclusion of the facts surrounding the 1993 incident, where appellant engaged in conduct similar to what occurred in this case. Presumably the prosecutor duly

cautioned Gutierrez in this regard. The mention of appellant's arrest record was no doubt unexpected by the prosecutor. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406.)

It is not reasonably probable a result more favorable to the defendant would have been reached had his arrest record not been mentioned as one of the factors causing Gutierrez to believe appellant was in a gang. Appellant's argument is without merit.

V. Sufficiency of the Evidence That Rolling 20's is a Criminal Street Gang

A. Appellant's Argument

Appellant contends the prosecution failed to present any evidence of the gang's primary activities. There was thus insufficient evidence that the gang qualified as a criminal street gang under section 186.22, subdivision (f), and insufficient evidence to support the true finding on the gang allegation.

B. Relevant Authority

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

A "criminal street gang" is defined under the statute as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having *as one of its primary activities* the commission of one or more of the criminal acts enumerated in [subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.'" (§ 186.22, subd. (f), italics added; *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323

(*Sengpadychith*.) The definition excludes the occasional commission of those crimes by the group's members.

“Evidence of one of a gang's primary activities might consist of proof: the group's members consistently and repeatedly have previously committed criminal activity listed in section 186.22, subdivision (e) [citations]; of conduct contemporaneous with the commission of the charged offenses [citations]; or in the form of opinion testimony often provided by an experienced detective [Citations]. Sometimes, the elements of a section 186.22 gang enhancement may be proven by a combination of documentary evidence; percipient witness testimony; and opinion testimony by an experienced investigator. [Citation.] We review a section 186.22 gang enhancement finding for substantial evidence. [Citations.] When conducting substantial evidence review, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact that can reasonably be deduced from the testimony. [Citations.] We apply the same standard of review when a case relies in part on circumstantial evidence. [Citations.] (*People v. Cortes* (2009) 174 Cal.App.4th 1335, 1344-1345.)

C. Evidence Sufficient

Even though the prosecutor did not specifically ask Gutierrez to state the primary activities of the Rolling 20's gang, his testimony along with other evidence provided sufficient substantial evidence to support the true finding on the gang enhancement. Gutierrez testified that he had investigated the Rolling 20's gang for 17 years. He explained that some gang members join the gang by putting in work, i.e., they go out and commit crimes to show they are worthy. He said he was personally aware of crimes committed by Rolling 20's gang members and testified about James Burnett, who was convicted in September 2005 of a robbery committed in June 2005. Burnett was a gang member at the time of this offense. Gutierrez also testified about David Harvey, who was convicted in June 2005 of attempted murder and marijuana sales, committed in September 2005, for the benefit of the gang. Gutierrez was also familiar with appellant

as a member of the Rolling 20's Crip gang. In explaining the difference between a tagging crew and a gang, Gutierrez stated that a tagging crew spray paints their monikers on a wall whereas a "gang is a group of guys or girls that take it a step further. They'll commit violent criminal acts usually with a weapon for the benefit of their gang." In answer to the prosecutor's hypothetical question based on the facts of this case, Gutierrez testified that "members of the Rolling 20's Crip gang commit and actively engaged in violent criminal acts. They commit these acts oftentimes using weapons to prove to their fellow gang members and to show the victims and the community that they're worthy enough to be a member of the Rolling 20's Crip gang." Gutierrez stated that the Rolling 20's gang members and Insane Crips gang members will shoot and kill each other if the two gangs are unable to work together to make money.

Thus, Gutierrez's testimony established that the Rolling 20's gang committed criminal activity "*consistently and repeatedly*" rather than on an "occasional" basis. (See *Sengpadychith, supra*, 26 Cal.4th at p. 324.) In *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224, the court held that the commission of three violent felonies, including the charged offense, within a three-month period of time was sufficient to satisfy the requirement of primary activity. Here, Gutierrez testified about two violent crimes committed by two Rolling 20's members in June 2005 and September 2005, three months apart. The current offenses of murder and attempted murder were committed in December 2005. In a period of six months, four serious crimes were committed by Rolling 20's gang members, demonstrating that criminal acts are one of the gang's primary activities.

Appellant's contention is without merit.

VI. Sufficiency of the Evidence in Support of Convictions

A. Appellant's Argument

According to appellant, the evidence was insufficient to support his convictions. The identification was insufficient, and the corroborating evidence was weak.

B. Relevant Authority

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Thus, “our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment.” (*People v. Hill* (1998) 17 Cal.4th 800, 849.) Reversal is only warranted where it clearly appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (*People v. Bolin, supra*, 18 Cal.4th at p. 331.)

An out-of-court identification is sufficient to support a conviction, even if the witness is unable to positively identify the defendant at trial. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, 272.) The trier of fact confronted with an out-of-court identification repudiated at trial must decide whether to believe the identification or the in-court repudiation of that identification. In doing so, the trier of fact may consider factors such as the witness’s prior familiarity with the defendant, the opportunity and ability to observe the defendant during the commission of the crime, the motive to falsely implicate the defendant, and the level of detail given in the identification and any accompanying description of the crime. (*Id.* at p. 267.) The trier of fact may also consider the possible reasons for the repudiation of the identification, including the witness’s fear of retaliation or explanation for making a false or erroneous identification. (*Id.* at pp. 267-268.)

C. Evidence Sufficient

Appellant concentrates on the fact that Johnson chose appellant as the one who most resembled the shooter and asserts that this did not amount to an identification. Appellant also asserts there was no other credible evidence supporting the verdict. He argues that Johnson’s failure to identify appellant in person must be given greater weight

than his assessment of a photograph. Also, the fact that appellant's cousin owned a white Blazer is weak evidence that appellant used it in the crime. Lastly, appellant's proximity to the murder weapon in a car occupied by four other people two days after the crime does not provide substantial evidence.

We believe sufficient evidence supports the jury's verdict. Johnson circled appellant's picture in a photographic lineup four days after the shooting. Johnson was particular in his identification, asserting that, although the individual who shot at him seemed older and darker, the person depicted "looks like him." He later told Mendoza that, upon further reflection, he was sure the person he had chosen was the person who shot him. The prosecution elicited that Johnson had told the police he was afraid of identifying the suspect at trial because he felt vulnerable to retaliation. He feared he would experience difficulties in prison because he had cooperated with police. The jury also heard from detectives at trial about the general reluctance of witnesses to cooperate in gang-related cases for fear of suffering injury or death once labeled as a snitch.

Appellant was linked to the car that Johnson saw at the time of the shooting. Johnson stated that Lanuza told him to look out for a white Jeep just before the shooting, and Johnson himself saw a white car in the alley as he ran away. The same white car drove past his friend's house where he was hiding after the shooting.

Appellant's cousin Kimico testified that she recalled lending her Blazer to appellant on a weekday in December 2005. Her Blazer was a white 1991 model. Johnson viewed a photograph of Kimico's car and emphatically stated it looked like the car he saw on the night of the shooting. Vannoy also saw an older white Blazer pass by the liquor store and drive into the alley at the time of the shooting. Vannoy was very familiar with the car because he had owned an older model Blazer himself. Also, he had noticed an older white Blazer driven by an attractive woman pass by earlier in the day. He identified Kimico's Blazer as being of the same type and color as the Blazer he saw at the time of the shooting. Thus, there was strong circumstantial evidence that Kimico's car, which was borrowed by appellant, was used in the shooting of Lanuza.

Finally, the circumstances surrounding the recovery of the murder weapon provided a strong link to appellant. Two days after the shooting, officers who stopped the Yukon saw appellant appear to be stuffing something behind his seat. When police searched the area where appellant was reaching, they found two guns, including the murder weapon.

“[I]t is the *jury*, not the appellate court, which must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Moreover, with respect to circumstantial evidence, “[a]lthough it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citation.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Substantial evidence supports the jury’s verdicts in this case.

VII. Cumulative Error

Appellant contends the cumulative effect of the errors he alleges was an increase in the level of prejudice. He claims that reversal is required even if this court finds that the errors committed by the trial court were not individually sufficient to establish the required prejudice for reversal.

We find no merit in appellant’s cumulative error argument. Our review of the record assures us that appellant received due process and a fair trial. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1006.) Whether considered individually or for their cumulative effect, none of the alleged errors affected the trial process, deprived appellant of his constitutional rights, or otherwise accrued to his detriment. (*Ibid.*; *People v. Sanders, supra*, 11 Cal.4th 475, 565; *People v. Cudjo* (1993) 6 Cal.4th 585, 637.) There

has been no showing of cumulative prejudicial error of a degree sufficient to permit reversal. As the California Supreme Court has stated, “A defendant is entitled to a fair trial, not a perfect one.” (*People v. Mincey, supra*, 2 Cal.4th 408, 454.)

VIII. Gang Enhancement and Indeterminate Term

In a supplemental brief, appellant argued that the trial court erred when it added a 10-year enhancement pursuant to section 186.22, subdivision (b)(1)(C) to appellant’s indeterminate life term for the murder. Respondent concedes that appellant is correct.

Section 186.22, subdivision (b)(5) provides that, when a defendant commits a crime punishable by imprisonment for life, the defendant is subject to a minimum term of 15 years before being considered for parole. This 15-year minimum term is in lieu of the determinate gang enhancement, such as the 10-year term imposed in appellant’s case. “The determinate term enhancement provided for in [section 186.22,] subdivision (b)(1)(C) is to be applied only when the conviction is of a violent offense for which a *determinate* term is [prescribed]; if the conviction is of a crime for which an *indeterminate term* of life in prison is [prescribed], the limitation upon parole eligibility provided for in [section 186.22,] subdivision (b)(5) is applicable. If the parole limitation of [section 186.22,] subdivision (b)(5) is applicable, the 10-year enhancement is not.” (*People v. Fiu* (2008) 165 Cal.App.4th 360, 390, fn. omitted, citing *People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

In this case the trial court erred in imposing a 10-year enhancement pursuant to section 186.22, subdivision (b)(1)(C). Instead, the court should have imposed a limitation upon appellant’s minimum parole eligibility of 15 years, pursuant to section 186.22, subdivision (b)(5). Imposition of a sentence not authorized by law is subject to judicial correction whenever the error comes to the attention of the trial court or reviewing court. (*People v. Panizzon* (1996) 13 Cal.4th 68, 88; *People v. Serrato* (1973) 9 Cal.3d 753, 763, disapproved on another point in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Therefore, we strike the 10-year gang enhancement imposed in count 1.

DISPOSITION

The judgment is modified to strike the 10-year gang enhancement imposed in count 1 pursuant to section 186.22, subdivision (b) and to substitute therefor the 15-year minimum parole eligibility requirement. In all other respects the judgment is affirmed. The superior court is directed to modify the abstract of judgment to delete the enhancement under section 186.22, subdivision (b) and to forward a copy of the amended abstract to the Department of Correction and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST